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McGuireWoods LLP  
Gateway Plaza  
800 East Canal Street  
Richmond, VA 23219-3916  
Tel 804.775.1000  
Fax 804.775.1061  
www.mcguirewoods.com

Bernard L. McNamee  
Direct: 804.775.7878

McGUIREWOODS

bmcnamee@mcguirewoods.com  
Fax: 804.698.2065

16093009

September 26, 2016

**VIA ELECTRONIC DELIVERY**

Mr. Joel H. Peck, Clerk  
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Richmond, Virginia 23219

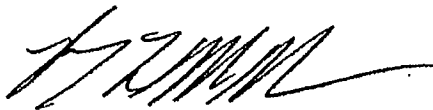
*Application of Appalachian Power Company For approval of an experimental rider  
for the purchase of non-dispatchable renewable energy*  
**Case No. PUE-2015-00040**

Dear Mr. Peck:

Please find enclosed for electronic filing in the above-referenced proceeding the Motion of Virginia Electric and Power Company For Leave to File a *Notice of Participation Out of Time and to File a Response to Appalachian Power Company's Motion to Withdraw Application and Request to Hold Comment Period in Abeyance or, if the Motion to Withdraw is Denied, to Participate and File Comments to Chief Hearing Examiner's Report* ("Motion"). Also, please find enclosed the Company's Notice of Participation and Response to the Motion to Withdraw, which are included with the Motion as Attachments A and B, respectively.

Please do not hesitate to call if you have any questions in regard to the enclosed.

Very truly yours,



Bernard L. McNamee

Enclosures

cc: Honorable Deborah V. Ellenberg, Chief Hearing Examiner  
D. Mathias Roussy, Jr., Esq.  
Ashley Macko, Esq.  
Lisa S. Booth, Esq.  
Service List

COMMONWEALTH OF VIRGINIA  
STATE CORPORATION COMMISSION

APPLICATION OF	)	
	)	
APPALACHIAN POWER COMPANY	)	
	)	Case No. PUE-2015-00040
For approval of an experimental rider	)	
for the purchase of non-dispatchable	)	
renewable energy	)	

**MOTION OF VIRGINIA AND ELECTRIC POWER COMPANY FOR  
LEAVE TO FILE A NOTICE OF PARTICIPATION OUT OF TIME AND TO FILE  
A RESPONSE TO APPALACHIAN POWER COMPANY'S *MOTION TO WITHDRAW  
APPLICATION AND REQUEST TO HOLD COMMENT PERIOD IN ABEYANCE* OR, IF  
THE MOTION TO WITHDRAW IS DENIED, TO PARTICIPATE AND  
FILE COMMENTS TO CHIEF HEARING EXAMINER'S REPORT**

Pursuant to Rules 80 and 110 of the Rules of Practice and Procedure (the "Procedural Rules") of the State Corporation Commission (the "Commission"), 5 VAC 5-20-80 and -110, Virginia Electric and Power Company ("Dominion Virginia Power"), by counsel, hereby moves the Commission for leave to file a notice of participation out of time<sup>1</sup> in the above-styled proceeding and to file a response to Appalachian Power Company's ("APCo") *Motion to Withdraw Application and Request to Hold Comment Period in Abeyance*<sup>2</sup> ("Motion to Withdraw") or, should the Motion to Withdraw be denied, to address certain legal questions raised in the report of the Chief Hearing Examiner issued on August 31, 2016 in the above-captioned proceeding (the "Report").<sup>3</sup>

In support of its Motion, Dominion Virginia Power states as follows:

<sup>1</sup> Dominion Virginia Power's Notice of Participation Out of Time is included as Attachment A.

<sup>2</sup> APCo filed its Motion to Withdraw requesting, among other things, that the Chief Hearing Examiner hold the comment period in abeyance pending a ruling on the Motion to Withdraw. The Commission issued an Order in this proceeding directing the parties and Staff to file responses to the Motion to Withdraw and suspending the period for filing comments on the Report pending further order of the Commission.

<sup>3</sup> Dominion Virginia Power's Response to the Motion to Withdraw is included as Attachment B. Pursuant to Procedural Rule 110, 5 VAC 5-20-110, and Ordering Paragraph (1) of the September 19, 2016 Order in this proceeding, responses to APCo's Motion to Withdraw are due on or before September 26, 2016.

## INTRODUCTION

APCo initiated this proceeding with the filing of an application on April 17, 2015 (“Application”) for the express purpose of obtaining approval of an experimental rider associated with its Renewable Generation Purchase Program (“Rider RGP”).

However, at the evidentiary hearing in this matter, counsel for Appalachian Voices, the Chesapeake Climate Action Network, and the Virginia Chapter of the Sierra Club (collectively, “Environmental Respondents”) requested the Commission to consider issues that were neither germane to APCo’s Application nor the subject of prior public notice.<sup>4</sup> In particular, Environmental Respondents claimed that Va. Code § 56-594 already allows solar customer generators to enter into third-party purchase power agreements without the need for a rider like Rider RGP.<sup>5</sup> Furthermore, in its post-hearing brief, Maryland DC Virginia Solar Energy Industries Association (“MDV-SEIA”) asserted that “Third-party PPAs are currently lawful in APCo’s service territory pursuant to Code Section 56-577(A)(5)(a)[.]”<sup>6</sup>

Even though the Report notes that decisions on these two issues are *not* necessary to determine if APCo’s Application should be granted or denied (*i.e.*, whether the Application satisfies the requirements of Va. Code § 56-234), the Report nevertheless comments about the meanings of Va. Code §§ 56-577 and 56-594.<sup>7</sup> Dominion Virginia Power, as a public utility subject to the statutory provisions governing the operations of utilities in Virginia, has a substantial interest in the interpretation of these two statutory provisions.

Specifically, the Report determines that Va. Code § 56-577 permits a third-party renewable generator to sell electricity through a power purchase and sale agreement (“PPA”) to

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<sup>4</sup> See Tr. 12:12-13:14.

<sup>5</sup> See Tr. 12:12-13:14. APCo’s counsel addressed the Environmental Respondents’ legal issues by invoking Va. Code §56-577. Tr. 18:6-18.

<sup>6</sup> Post Hearing Brief of MDV-SEIA at 3.

<sup>7</sup> Report at 22-25.

a franchised utility's retail customer when the utility does not offer a 100% renewable tariff even if such third-party renewable generator does not comply with the utility's Commission-approved tariff for licensed service providers requiring that such renewable generator serve 100% of the customer's load.<sup>8</sup> Dominion Virginia Power seeks leave to participate in this proceeding and to file a response to the Motion to Withdraw (which Dominion Virginia Power does not oppose) to explain why the Commission, if it chooses to grant the Motion to Withdraw, should make an affirmative statement that the Report's analysis has no precedential effect and may not be relied upon as to the meaning of Va. Code § 56-577. If the Motion to Withdraw is denied, then Dominion Virginia Power would seek to participate in the proceeding and file comments on the Report to address this extraneous legal question. In support of this request, Dominion Virginia Power's response will explain how the Report's conclusion is contrary to the plain reading of Va. Code § 56-577, other parts of the Virginia Code, the Commission's Retail Access Rules, and APCo's (as well as Dominion's) Commission-approved tariff.

In addition, the Report determines that Va. Code § 56-594 A "expressly authorizes customer generators to enter into stand alone, behind-the-meter PPAs with third-party generators that own and operate a renewable generating facility for the customer."<sup>9</sup> The Report further comments on Va. Code § 56-594 as it relates to the meaning of "eligible customer-generator."<sup>10</sup> Dominion Virginia Power seeks leave to participate in this proceeding and to file a response to the Motion to Withdraw (which Dominion Virginia Power does not oppose) to explain why the Commission, if it chooses to grant the Motion to Withdraw, should make an affirmative statement that the Report has no precedential effect and cannot be relied as to the

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<sup>8</sup> Report at 22-24. Note that the Report states the assertions made by various respondents and then states "I agree." The Report also provides a similar analysis as to how Va. Code § 56-577 applies to Dominion Virginia Power. Report at 24.

<sup>9</sup> Report at 24.

<sup>10</sup> Report at 25.

meaning of Va. Code § 56-594. If the Motion to Withdraw is denied, then Dominion Virginia Power would seek to participate in the proceeding and file comments on the Report to address this extraneous legal question. In support of this request, Dominion Virginia Power's response will explain how the Report's conclusions about Va. Code § 56-594 are contrary to the plain reading of Va. Code § 56-594, other parts of Virginia law, and the Commission's Net Energy Metering Rules.<sup>11</sup>

Dominion Virginia Power had no previous basis to participate because the sole subject of this proceeding was simply the consideration of a tariff proposed for customers in APCo's exclusive service territory. The Commission's May 16, 2015 Order for Notice and Hearing ("Notice Order") did not provide reasonable notice about these extraneous legal questions and therefore interested parties, including Dominion Virginia Power, did not have a reasonable opportunity to comment on the legal questions. Furthermore, Dominion Virginia Power agrees with APCo, the Commission Staff ("Staff"), and the *Chief Hearing Examiner* that the merits of APCo's Application are not dependent on the resolution of these two legal questions.

Unfortunately, the Commission cannot merely ignore the Report's comments interpreting Va. Code §§ 56-577 and 56-594; it should specifically state that it is not adopting those findings and that the Report's comments on Va. Code §§ 56-577 and 56-594 cannot be relied upon by customers or generators. Such a statement is needed in order to avoid confusion and prevent a potential erosion of the exclusive franchise rights of incumbent utilities, which could ultimately hurt other customers.

Given its substantial interest in the interpretation of the Code provisions concerning third-party renewable generation and net metering policies, Dominion Virginia Power would be significantly prejudiced if it is not provided with an opportunity to participate and to be heard on

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<sup>11</sup> Regulations Governing Net Energy Metering, 20 VAC 5-315-10, *et seq.* ("Net Energy Metering Rules").

these legal questions. Therefore, Dominion Virginia Power respectfully moves for leave to participate out of time for the purpose of commenting on these legal questions, including by submitting a response to the Motion to Withdraw, or if the Motion to Withdraw is denied, to comment on the Report, consistent with Procedural Rule 10 and as necessary to serve the ends of justice<sup>12</sup> and for other purposes to address legal and policy questions in this proceeding.

### BACKGROUND

On April 17, 2015, APCo filed with the Commission its Application for approval of a voluntary pilot Rider RGP pursuant to Va. Code § 56-234 B. Under APCo's RGP program, its customers could purchase non-dispatchable renewable energy through APCo that is generated by an adjacent facility owned and operated by a third party. By its May 6, 2015 Notice Order, the Commission, among other things, docketed the Application,<sup>13</sup> directed APCo to provide public notice of the Application, established the procedural schedule for the case, set the matter for public hearing, and assigned the Chief Hearing Examiner to conduct all further proceedings in the case on behalf of the Commission and file a report. As directed, APCo timely filed proof of notice and service of the Application, which provided information to the public on APCo's Rider RGP Application and the Commission's Notice Order.<sup>14</sup> APCo's notice did not reference Va. Code §§ 56-577 and 56-594.

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<sup>12</sup> 5 VAC 5-2-10 ("When necessary to serve the ends of justice in a particular case, the commission may grant, upon motion or its own initiative, a waiver or modification of any of the provisions of these rules, except 5 VAC 5-20-220, under terms and conditions and to the extent it deems appropriate."); *see also In re: Joint Petition of Special Deputy Receivers of Doctors Insurance Reciprocal, Rrg, in receivership, American National Lawyers Insurance Reciprocal, RRG, in Receivership, and The Reciprocal Alliance, RRG, in Receivership, Joint Petitioners*, Case No. INS-2003-00092, Order Permitting Participation, at 11 n.30 (Oct. 8, 2003) (granting motion to intervene under Procedural Rule 10).

<sup>13</sup> *Application of Appalachian Power Company for approval to establish Experimental Rider R.G.P. for the purchase of non-dispatchable renewable generation*, Case No. PUE-2015-00040, Order for Notice and Hearing (May 6, 2015).

<sup>14</sup> Affidavit of Publication (June 23, 2015).

The Notice Order also directed persons interested in participating as a respondent in the proceeding to file a notice of participation on or before July 23, 2015.<sup>15</sup> Notices of participation were filed by the Office of the Attorney General, Division of Consumer Counsel (“Consumer Counsel”); the VML/VACo APCo Steering Committee (“Steering Committee”); MDV-SEIA; Environmental Respondents; and the Council of Independent Colleges in Virginia (“CICV”).

The evidentiary hearing for APCo’s Application convened as scheduled on September 29, 2015, with representatives appearing on behalf of APCo, Staff, Consumer Counsel, Steering Committee, MDV-SEIA, Environmental Respondents, and CICV. A review of the record reveals that, during opening statements, counsel for the Environmental Respondents requested for the first time in the proceeding<sup>16</sup> that the parties brief whether the Virginia Code allows retail customers to directly enter into PPAs with third-parties for the purchase of renewable energy.<sup>17</sup> Prior to that briefing request, neither Staff nor any of the respondents’ pre-filed testimony raised issues as to the interpretation of Va. Code §§ 56-577 and 56-594. In response to the Environmental Respondents’ briefing request, APCo’s counsel noted at the evidentiary hearing that the public and other interested parties – including Dominion Virginia Power – had not been placed on notice that the Commission might consider those legal questions concerning Va. Code §§ 56-577 and 56-594 in this proceeding.<sup>18</sup> Nevertheless, the Chief Hearing Examiner requested

<sup>15</sup> See Notice Order, Ordering Paragraph (8).

<sup>16</sup> See Tr. 12:12-25; 13:1-14 (Jaffe on behalf of Environmental Respondents).

<sup>17</sup> Environmental Respondents mentioned Va. Code § 56-594. APCo’s counsel addressed the Environmental Respondents’ legal issues by invoking Va. Code § 56-577 (Tr. 18-6-19). In its post-hearing brief, MDV-SEIA asserted that “Third-party PPAs are currently lawful in APCo’s service territory pursuant to Code Section 56-577(A)(5)(a).” MDV-SEIA Post Hearing Brief at 3. The Report addressed both Va. Code §§ 56-577 and 56-594. On September 28, 2015, two weeks prior to the evidentiary hearing, Virginia, Maryland, and Delaware Association of Electric Cooperatives filed a Motion for Leave to File Comments Out Of Time, together with Comments contending that, except for the retail access exceptions permitted in Va. Code § 56-577 and the 2013 legislation creating the solar pilot PPA program in Dominion Virginia Power’s service area, retail customers in Virginia are not permitted to have electric service provided at retail by any entity other than their incumbent public utility. See Comments, at 7-8 (Sep. 28, 2015).

<sup>18</sup> Tr. 18:11-19. On brief, APCo’s counsel reiterated this position: “These questions are best resolved in another proceeding so that the Commission can give proper notice and so that other entities with real and significant



that the parties address these legal questions in post-hearing briefs.<sup>19</sup> The parties did as directed, with APCo and Staff both noting that the Commission need not address these issues in considering the merits of APCo's Application.<sup>20</sup>

On August 31, 2016, the Chief Hearing Examiner issued the Report, which found that APCo's Application should be denied. The Report also agreed with APCo and Staff "that the Commission need not address those extraneous issues [whether §§ 56-577 and 56-594 allow customers to purchase renewable generation from third-party sellers] to determine if [APCo's] proposal meets the statutory standard of Code § 56-234."<sup>21</sup>

In spite of this observation, however, the Report still asserted that: (1) Va. Code § 56-577 permits a third-party renewable generator to sell electricity through a PPA to a franchised utility's retail customer when the utility does not offer a 100% renewable tariff even if such third-party renewable generator does not comply with the utility's Commission approved tariff for licensed service providers requiring that such renewable generator serve 100% of the customer's load;<sup>22</sup> and (2) Va. Code § 56-594 A "expressly authorizes customer generators to enter into stand alone, behind-the-meter PPAs with third-party generators that own and operate a

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interests in the resolution of these questions can appear, be heard, present evidence and help develop a robust record." APCo Post-Hearing Brief, at 2 (Nov. 3, 2015).

<sup>19</sup> Tr. 138:10-21.

<sup>20</sup> See APCO Post-Hearing Brief, at 13-14 (Nov. 3, 2015); Post-Hearing Brief of the Staff, at 13-14 (Nov. 3, 2015).

<sup>21</sup> Report at 22.

<sup>22</sup> Report at 22-24. The Report also made a determination as to how Va. Code § 56-577 applies to Dominion Virginia Power:

The provisions of Code § 56-577 A 5 are not limited to Dominion Virginia Power, and clearly allow customers under any customer class "[t]o purchase electric energy provided 100 percent from renewable energy from any supplier of electric energy licensed to sell retail electric energy within the Commonwealth ... if the incumbent electric utility serving the exclusive service territory does not offer an approved tariff for electric energy provided 100 percent from renewable energy . . . ."

Report at 24 (internal citations omitted). Dominion Virginia Power disagrees with the Report's premise that this interpretation of Va. Code § 56-577 applies to Dominion Virginia Power for all the reasons set forth in the Dominion Virginia Power's proposed response to APCo's Motion to Withdraw.

renewable generating facility for the customer”<sup>23</sup> and “net metering is currently a legal and viable option for customers.”<sup>24</sup> The Report’s interpretation of Va. Code § 56-594 also addresses the meaning of “eligible customer-generator.”<sup>25</sup>

The Report apparently offered these views to remove “uncertainty” and to provide “clarity” to the renewable generation market,<sup>26</sup> although the Report notably excluded these two issues from its list of specific “Findings and Recommendations.”<sup>27</sup> The Report also directed, pursuant to Procedural Rule 120 C, 5 VAC 5-20-120 C, that comments to the Report be filed with the Commission within 21 days of issuance, or September 21, 2016.<sup>28</sup>

However, on September 16, 2016, APCo filed the Motion to Withdraw, explaining that over the past year and a half since filing the Application it has sharpened its focus on the provision of renewable energy directly to its customers and is no longer seeking approval of Rider RGP.<sup>29</sup> APCo stated that Consumer Counsel and MDV-SEIA have sought to convert the Rider RGP proceeding into a referendum on Virginia law and granting its Motion to Withdraw will not prevent those parties from addressing the two legal questions in a more appropriate venue.<sup>30</sup> APCo requested that the Chief Hearing Examiner hold the comment period in abeyance pending a ruling on the Motion to Withdraw. On September 19, 2016, the Commission entered an Order that, among other things, directed responses to the Motion to Withdraw to be filed on or before September 26, 2016 and suspended the period for filing comments on the Report pending further order of the Commission.<sup>31</sup>

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<sup>23</sup> Report at 24.

<sup>24</sup> Report at 25.

<sup>25</sup> Report at 25.

<sup>26</sup> Report at 22 and 23.

<sup>27</sup> Report at 25-26.

<sup>28</sup> See Report at 26.

<sup>29</sup> Motion to Withdraw at 1-2.

<sup>30</sup> Motion to Withdraw at 2.

<sup>31</sup> September 19, 2016 Order, Ordering Paragraphs (1) and (3).

## LEGAL STANDARD

The Procedural Rules permit any person or entity to participate as a party to a regulatory proceeding upon the filing of a notice of participation as a respondent. Each notice of participation is required to include the following: (1) a precise statement of the respondent's interest in the matter; (2) a statement of the specific action sought "to the extent then known," and (3) "the factual and legal bases for the action."<sup>32</sup>

Although notices of participation as a respondent "shall be filed within the time prescribed by the commission,"<sup>33</sup> the Commission may modify or waive rule provisions and allow parties leave to participate as respondents out of time "[w]hen necessary to serve the ends of justice in a particular case . . . under terms and conditions and to the extent it deems appropriate."<sup>34</sup> If permitted to participate, Dominion Virginia Power should be permitted to file a response to APCo's Motion to Withdraw pursuant to Procedural Rule 110, 5 VAC 5-20-110, and Ordering Paragraph (1) of the September 19, 2016 Order directing responses to the Motion to Withdraw to be filed on or before September 26, 2016.<sup>35</sup>

## ARGUMENT

### **1. Dominion Virginia Power has a substantial interest in the extraneous legal questions addressed in the Report.**

Dominion Virginia Power is a public service corporation organized under the laws of the Commonwealth of Virginia furnishing electric service to the public within its Virginia service territory. Dominion Virginia Power also furnishes electric service to the public in portions of North Carolina. Dominion Virginia Power's electric system, consisting of facilities for

<sup>32</sup> 5 VAC 5-20-80 B.

<sup>33</sup> 5 VAC 5-20-80 B.

<sup>34</sup> 5 VAC 5-2-10; *see also In re: Joint Petition of Special Deputy Receivers of Doctors Insurance Reciprocal, Rrg, in receivership, American National Lawyers Insurance Reciprocal, RRG, in Receivership, and The Reciprocal Alliance, RRG, in Receivership, Joint Petitioners*, Case No. INS-2003-00092, Order Permitting Participation, at 11-12 & n.30 (Oct. 8, 2003) (granting motion to intervene under Procedural Rule 10 to serve the ends of justice).

<sup>35</sup> September 19, 2016, Ordering Paragraph (1).

generation, transmission, and distribution of electric energy, is interconnected with the electric systems of neighboring utilities, and is a part of the interconnected network of electric systems serving the continental United States. By reason of its operation in two states and its interconnections with other utilities, Dominion Virginia Power is engaged in interstate commerce. Dominion Virginia Power is also an incumbent electric utility as defined in Va. Code § 56-576 and referenced in Va. Code § 56-577 and has a net energy metering program pursuant to Va. Code § 56-594.

Accordingly, Dominion Virginia Power has a substantial interest in the resolution of the extraneous legal matters addressed in the Report—that is, whether Va. Code §§ 56-577 A 5 and 56-594 permit customers to purchase renewable generation from third-party sellers without having to comply with Dominion Virginia Power’s Commission-approved tariff for licensed competitive service providers and whether the net metering statute permits suppliers to sell energy to a utility’s net metering customers. The views on the two Code provisions provided in the Report are inconsistent with the plain language of these statutes, other parts of the Code, the Commission’s rules promulgated pursuant to these Code provisions, and Dominion Virginia Power’s Commission-approved tariffs. Therefore, Dominion Virginia Power wishes to participate because of its substantial interest and concern about the possible implications of the Report. In addition, because the views on the questions asserted in the Report – if adopted by the Commission or left unaddressed in an order granting the Motion to Withdraw – could be claimed to erode Dominion Virginia Power’s exclusive franchise rights, Dominion Virginia Power also has a substantial interest in preserving its existing property rights in its service territory.<sup>36</sup>

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<sup>36</sup> See *Town of Culpeper v. Virginia Electric and Power Company, et al.*, 215 Va. 189, 194 (1974) (noting statutory franchise rights are property rights that are entitled to protection of the law).

**2. Dominion Virginia Power seeks the opportunity to respond solely to the extraneous statutory interpretations provided in the Report.**

In moving for leave to participate in this proceeding, Dominion Virginia Power seeks the opportunity to respond to the two extraneous legal questions related to Va. Code §§ 56-577 A 5 and 56-594 contained in the Report, including how the Commission may address those issues in an order addressing the Motion to Withdraw. Consistent with the Commission's prior rulings allowing respondents to file notices of participation out of time,<sup>37</sup> Dominion Virginia Power states that it will comment *solely* on the Report's interpretations concerning Va. Code §§ 56-577 A 5 and 56-594 and how the Commission should address those issues, without the need to introduce any additional evidence into the record.<sup>38</sup> Dominion Virginia Power has no intention to address the merits of APCo's Application that initiated this regulatory proceeding and was previously noticed to the public. Dominion Virginia Power has immediate, pecuniary, and substantial interests, including property rights, implicated by the two extraneous legal questions addressed in the Report. Dominion Virginia Power seeks to protect these interests by submitting a response to the Motion to Withdraw on the Report's legal conclusions for the Commission's consideration.

**3. Dominion Virginia Power has factual and legal bases to submit a response in opposition to the extraneous legal questions.**

Dominion Virginia Power has several factual bases to be heard at this stage in the proceeding:

<sup>37</sup> See *Application of Community Electric Cooperative for a general increase in electric rates*, Case No. PUE-2012-00041, Hearing Examiner's Ruling, at 3-4 (Jan. 4, 2013) (allowing cooperatives to file notice of participation out of time participate in proceeding to address one issue).

<sup>38</sup> See *Application of CPV Warren, LLC For a certificate of public convenience and necessity for electric generation facilities in Warren County, Virginia*, Case No. PUE-2002-00075, Hearing Examiner's Ruling, at 1 (July 17, 2002) (granting notice of participation out of time where the respondent asserted it would accept the record "as is" and without modification).

First, the extraneous legal questions addressed in the Report concerning third-party renewable generation and net metering policies under Va. Code §§ 56-577 and 56-594 were never publically noticed and were raised by respondents at the evidentiary hearing at which the record was closed. Now that the Report has provided its views on these questions, Dominion Virginia Power seeks leave to participate in this proceeding in a manner consistent with the Commission granting leave to file notices of participation out of time.<sup>39</sup>

Second, prior to the issuance of the Report, Dominion Virginia Power had no basis to enter into this proceeding as a respondent. Pursuant to the Notice Order, notices of participation were to be filed no later than July 23, 2015. Yet at that stage in the proceeding, APCo's publically-noticed Application simply concerned a tariff proposed under Va. Code § 56-234 for customers in its exclusive service territory, and there was no indication that legal questions related to Va. Code §§ 56-577 and 56-594 would be under consideration. Because Commission precedent generally holds that the Commission does not address issues that are not germane to pending applications,<sup>40</sup> Dominion Virginia Power had no expectation that the Report would address those two extraneous legal questions. Thus, there was no reason for Dominion Virginia Power to file a timely notice of participation, and until the Report was issued, it was not certain that it would be appropriate for Dominion Virginia Power to seek leave to participate in this matter.

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<sup>39</sup> See *Application of Columbia Gas of Virginia, Inc. For Approval Of A Performance Based Rate Regulation Methodology Pursuant To Va. Code § 56-235.6 Commonwealth Of Virginia, Ex Rel. State Corporation Commission Ex Parte, In Re: Investigation of the justness and reasonableness of current rates, charges, and terms and conditions of service*, Case No. PUE-2005-00098; Case No. PUE-2005-00100, 2006 Va. PUC LEXIS 952, Hearing Examiner's Ruling, at \*6 (Oct. 24, 2006) ("[T]he Commission has frequently granted requests for late intervention when no one would be prejudiced and the procedural schedule would not be jeopardized.").

<sup>40</sup> See *Collegiate Clean Energy, LLC - For a license to conduct business as a competitive service provider for electricity in the Commonwealth of Virginia*, Case No. PUE-2012-00102, 2012 S.C.C. Ann. Rep. 507, Order Granting Licensure, at 3 (Oct. 19, 2012) (declining to expand the scope of the proceeding to consider extraneous policy issues).

Third, although the Report states that it addressed these extraneous issues now to provide “clarity” for the renewable generation market,<sup>41</sup> the Report’s conclusions on these two issues were noticeably omitted from the list of specific “Findings and Recommendations.”<sup>42</sup> It is therefore unclear whether the Report’s conclusions on these two issues are legal findings that are actually before the Commission for approval. Unfortunately, the Commission cannot merely ignore the Report’s comments interpreting Va. Code §§ 56-577 and 56-594; it should specifically state that it is not adopting those findings and that the Report’s comments cannot be relied upon as precedent. Such a statement is needed in order to avoid confusion and prevent a potential erosion of the incumbent utilities’ exclusive franchise rights.

It is well-settled that interested persons in a Commission proceeding should be provided with “reasonable notice and the opportunity for full and fair participation,” including the right to be heard.<sup>43</sup> As discussed *supra*, the record shows that public notice was not provided that these statutes would be addressed in this proceeding. The interests of fairness and the ends of justice require that Dominion Virginia Power be afforded the opportunity to be heard at this time. Moreover, the Report’s conclusions concerning these extraneous legal questions may infringe upon Dominion Virginia Power’s exclusive franchise rights. Because utility franchise rights are

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<sup>41</sup> Report at 23.

<sup>42</sup> See Report at 25-26.

<sup>43</sup> *Virginia Elec. & Power Co. v. State Corp. Comm’n and Div. of Consumer Counsel, Office of the Attorney Gen.*, 226 Va. 541, 548-550 (1984) (vacating Commission order and ordering re-notice of proceeding because Commission provided no notice that it contemplated summary disposition and gave interested persons no opportunity to be heard); see also *See Am. Bankers Life Assurance Co. of Fla. v. Div. of Consumer Counsel, Office of Attorney Gen.*, 220 Va. 773, 788-89 (1980) (“[C]hanges in a promulgated rule may occasionally be so significant that their adoption without an additional period for notice and comment would deny interested parties their rights guaranteed by Article IX, Section 3 of the Constitution of Virginia.”).

recognized property rights,<sup>44</sup> a utility is entitled to due process, including the right to be heard, before such rights can be infringed.<sup>45</sup>

**4. Dominion Virginia Power should be permitted to participate out of time to file its response to the Report.**

Dominion Virginia Power should not be time-barred from obtaining leave to participate at this stage in the proceeding. Although the deadline has passed for interested persons to file a notice of participation, the ends of justice require that Dominion Virginia Power be permitted leave to participate out of time.

As identified above, the prejudice to Dominion Virginia Power by not being afforded the opportunity to respond to the Report is substantial. If the Report's interpretations of Va. Code §§ 56-577 and 56-594 were to be affirmed by the Commission, such a ruling could directly affect Dominion Virginia Power's exclusive service franchise rights and its Commission-approved tariffs. Consequently, Dominion Virginia Power's due process rights, not to mention the rights of similarly-situated utilities, could be infringed if not given the opportunity to participate and submit comments on the Report and how the Commission should address those issues, whether it be in an order on the Motion to Withdraw or a substantive decision on APCo's application in this proceeding. With such far-reaching implications at stake,<sup>46</sup> Dominion Virginia Power should have the opportunity to be heard on these significant issues of statutory interpretation concerning third-party sales to the Dominion Virginia Power's retail electric customers in Virginia.

<sup>44</sup> See *Town of Culpeper v. Virginia Elec. & Power Co., et al.*, 215 Va. 189, 194 (1974) (noting statutory franchise rights are property rights that are entitled to protection of the law).

<sup>45</sup> See *Virginia Elec. & Power Co. v. State Corp. Comm'n*, 226 Va. 541, 548 (1984) (noting that "[t]he opportunity to be heard [is] an essential feature of the right to due process . . ."); *Williams v. Virginia Elec. & Power Co.*, 18 Va. App. 569, 576-77 (Va. Ct. App. 1994) (noting that procedural due process require that before an individual is deprived of any significant property interest he be granted a meaningful opportunity to be heard).

<sup>46</sup> See *In re: Joint Petition of Special Deputy Receivers of Doctors Insurance Reciprocal, Rrg, in receivership, American National Lawyers Insurance Reciprocal, RRG, in Receivership, and The Reciprocal Alliance, RRG, in Receivership, Joint Petitioners*, Case No. INS-2003-00092, Order Permitting Participation, at 11-12 & n.30 (Oct. 8, 2003) (granting motion to intervene under Procedural Rule 10 because decision in case "will have wide-ranging impact").



Conversely, the other parties in this proceeding would not be prejudiced by the Dominion Virginia Power being afforded the opportunity to participate and submit a response to the Motion to Withdraw or file comments on the Report limited to the two legal questions in the Report. As discussed *supra*, the merits of APCo's Application – again, the underlying basis for this proceeding – can be considered without the need to evaluate the extraneous legal questions, a fact that the Report conceded.<sup>47</sup> Further, Dominion Virginia Power takes no position on the merits of APCo's Application, so its comments would have no bearing on the Commission's ultimate decision to approve or deny Rider RGP. Last, Dominion Virginia Power would not cause delay to the proceeding. Dominion Virginia Power's Motion for Leave to respond to the Motion to Withdraw is being made within the time periods established by the Commission's September 19, 2016 Order.<sup>48</sup> Consistent with prior Commission orders granting out-of-time notices of participation, Dominion Virginia Power's response to the Motion to Withdraw (or comments to the Report) is narrowly focused and timely submitted and would have no impact on the record or the procedural schedule in this case.<sup>49</sup>

## CONCLUSION

If Dominion Virginia Power were not permitted to participate and comment on the legal questions addressed in the Report and how they are addressed in an order resolving the Motion to Withdraw, Dominion Virginia Power would be prejudiced and could be substantially harmed

<sup>47</sup> Report at 22 (“I agree with Staff and [APCo] that the Commission need not address those legal issues to determine if [APCo]’s proposals meet the statutory standard of Code § 56-234”).

<sup>48</sup> September 19, 2016 Order, Ordering Paragraph (1). See *Commonwealth of Virginia, ex rel. State Corporation Commission*, Case No. PUE-2000-00662, 2001 WL 1043055, at \*3 (June 28, 2001) (finding that comments should be accepted because no other party was likely to be prejudiced and comments would not cause delay to deliberations).

<sup>49</sup> See *Application of Appalachian Power Company For approval of transactions to acquire interests in the Amos and Mitchell generation plants and to merge with Wheeling Power Company*, Case No. PUE-2012-00141, Order, at 2-3 (May 13, 2013) (granting party leave to file notice of participation out of time and to participate as a respondent after stating it would not broaden the issues or delay the proceeding, and would abide by the existing procedural schedule).

through the erosion of its exclusive franchise rights;<sup>50</sup> whereas, the parties currently participating in this matter would not be prejudiced if Dominion Virginia Power were permitted to participate and respond.<sup>51</sup> Therefore, pursuant to Procedural Rule 10, the ends of justice require that Dominion Virginia Power be permitted to file its notice of participation out of time to address the extraneous legal issues through a response to the Motion to Withdraw, or if that Motion is denied, to file comments on the Report's legal conclusions concerning third-party renewable generation and net metering policies.

For the reasons set forth in this motion, Dominion Virginia Power respectfully requests that it be allowed to participate as a respondent in this proceeding; that it be permitted to file a response to the Motion to Withdraw addressing the Report's legal analysis of third-party renewable generation and net metering policies; or if the Motion to Withdraw is denied, to comment on the Report; and that all pleadings and other documents issued in this proceeding by the Commission, the Commission Staff, or a party be served on Dominion Virginia Power and its counsel at the addresses below, and that the Commission's official service list be modified to reflect the same.

The address of Dominion Virginia Power is:

Lisa S. Booth  
Virginia Electric and Power Company  
120 Tredegar Street  
Richmond, VA 23219

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<sup>50</sup> See *Town of Culpeper v. Virginia Electric and Power Company, et al.*, 215 Va. 189, 194 (1974) (noting statutory franchise rights are property rights that are entitled to protection of the law).

<sup>51</sup> See *Application of CPV Warren, LLC For a certificate of public convenience and necessity for electric generation facilities in Warren County, Virginia*, Case No. PUE-2002-00075, Hearing Examiner's Ruling, at 1 (July 17, 2002) (granting notice of participation out of time where the respondent asserted it would accept the record without modification and would not delay the proceeding or cause prejudice to the existing parties).

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660036091

Counsel for Dominion Virginia Power is as follows:

Bernard L. McNamee  
William G. Bushman  
McGuireWoods LLP  
Gateway Plaza  
800 East Canal Street  
Richmond, VA 23219-3916

WHEREFORE, in accordance with the Commission's Rules of Practice and Procedure and applicable law, Dominion Virginia Power respectfully requests that the Commission issue an order that grants Dominion Virginia Power leave to file its Notice of Participation in Case No. PUE-2015-00040 out of time; to file a response on the Motion to Withdraw; or if such Motion is denied, to file comments to the Report responding to the two legal questions raised in the Report; and for all other relief deemed appropriate by the Commission.

Respectfully submitted,

By: 

Counsel

Lisa S. Booth  
Virginia Electric and Power Company  
120 Tredegar Street  
Richmond, VA 23219-4306  
804.819.2288 (LSB)  
*lisa.s.booth@dom.com*

Bernard L. McNamee  
William G. Bushman  
McGuireWoods LLP  
Gateway Plaza  
800 East Canal Street  
Richmond, VA 23219-391  
804.775.7878 (BLM)  
804.775.1806 (WGB)  
*bmcnamee@mcguirewoods.com*  
*wbushman@mcguirewoods.com*

*Counsel for Virginia Electric and Power Company*

September 26, 2016

COMMONWEALTH OF VIRGINIA  
STATE CORPORATION COMMISSION

APPLICATION OF	)	
	)	
APPALACHIAN POWER COMPANY	)	
	)	Case No. PUE-2015-00040
For approval of an experimental rider	)	
for the purchase of non-dispatchable	)	
renewable energy	)	

**NOTICE OF PARTICIPATION OUT OF TIME OF  
VIRGINIA ELECTRIC AND POWER COMPANY**

Pursuant to Rule 80 B of the Rules of Practice and Procedure (“Procedural Rules”) of the State Corporation Commission (“Commission”),<sup>1</sup> Virginia Electric and Power Company (“Dominion Virginia Power”), by counsel, hereby files its notice of participation as a respondent in the above-captioned proceeding (“Notice of Participation”). Accompanying this Notice of Participation is the *Motion of Virginia Electric and Power Company for Leave to File a Notice of Participation Out of Time and to File a Response to Appalachian Power Company’s Motion to Withdraw Application and Request to Hold Comment Period in Abeyance or, if the Motion to Withdraw is Denied, to Participate and File Comments on to the Chief Hearing Examiner’s Report* (“Participation Motion”). In support, Dominion Virginia Power states as follows:

1. On April 17, 2015, Appalachian Power Company (“APCo”) filed an application (“Application”) for the express purpose of obtaining approval of an experimental rider associated with its Renewable Generation Purchase Program (“Rider RGP”).<sup>2</sup> The Chief Hearing Examiner issued her Report on August 31, 2016 (“Report”) in the above-captioned proceeding addressing

<sup>1</sup> 5 VAC 5-20-80 B.

<sup>2</sup> *Application of Appalachian Power Company for approval to establish Experimental Rider R.G.P. for the purchase of non-dispatchable renewable generation*, Case No. PUE-2015-00040, Application, at 1 (Apr. 17, 2015).

legal questions about Va. Code §§ 56-577 A 5 and 56-594 that had not been included in the public notice for this proceeding. On September 16, 2016, APCo filed a *Motion to Withdraw Application and Request to Hold Comment Period in Abeyance* (“Motion to Withdraw”), and the Commission issued an Order on September 19, 2016, ordering, among other things, that: (1) responses to the Motion to Withdraw shall be filed on or before September 26, 2016; and (2) the period for filing comments on the Report is suspended pending further order of the Commission.<sup>3</sup>

2. Procedural Rule 80 B, 5 VAC 5-20-80 B, requires respondents to include in their notices of participation: (1) a precise statement of the interest of the respondent; (2) a statement of the specific action sought to the extent then known; and (3) the factual and legal basis for the action.

3. Dominion Virginia Power is a public service corporation organized under the laws of the Commonwealth of Virginia furnishing electric service to the public within its Virginia service territory. Dominion Virginia Power also furnishes electric service to the public in portions of North Carolina. Dominion Virginia Power’s electric system, consisting of facilities for generation, transmission, and distribution of electric energy, is interconnected with the electric systems of neighboring utilities, and is a part of the interconnected network of electric systems serving the continental United States. By reason of its operation in two states and its interconnections with other utilities, Dominion Virginia Power is engaged in interstate commerce. Dominion Virginia Power is also an incumbent electric utility as defined in Va. Code § 56-576 and referenced in Va. Code § 56-577 and has a net energy metering program

<sup>3</sup> September 19, 2016 Order, Ordering Paragraphs (1) and (3). Comments were to be filed pursuant to Commission Rule 5 VAC 5-120-120 C and the Report’s direction to file comments on the Report within 21 days – on or before September 21, 2016 – of the filing of the Report. Report at 26

pursuant to Va. Code § 56-594.

4. As explained in greater detail in Dominion Virginia Power's Participation Motion, Dominion Virginia Power has a substantial interest in the interpretation of the two statutory provisions – Va. Code §§ 56-577 A 5 and 56-594 – that are addressed in the Report. Because of the potential precedential effect of the legal views regarding these statutes contained in the Report and the harm those conclusions may impose on Dominion Virginia Power's exercise of its exclusive franchise rights, Dominion Virginia Power desires to participate out of time in this proceeding for the limited purpose of commenting on these legal questions, including by submitting a response to the Motion to Withdraw ("Response"), or if the Motion to Withdraw is denied, to comment on the Report to address the two legal questions related to the interpretation of Va. Code §§ 56-577 A 5 and 56-594. Dominion Virginia Power's Response, which is attached to the Participation Motion as Attachment B, *solely* addresses how the Commission should address the Report's interpretations concerning Va. Code §§ 56-577 A 5 and 56-594 and would not require the introduction of additional evidence into the record and would not impact the procedural schedule of this matter. These legal issues were not included in the public notice, and given Dominion Virginia Power's substantial interest in the interpretation of these two statutory provisions as contained in the Report, Dominion Virginia Power would be significantly prejudiced if not afforded the opportunity to participate and be heard on them.

5. Dominion Virginia Power's post office address is:

Virginia Electric and Power Company  
120 Tredegar Street  
Richmond, Virginia 23219

6. The addresses, telephone numbers and email addresses of the attorneys for Dominion Virginia Power are:

Lisa S. Booth  
 Dominion Resources Services, Inc.  
 120 Tredegar Street, RS-2  
 Richmond, Virginia 23219  
 (804) 819-2288 (LSB)  
*lisa.s.booth@dom.com*

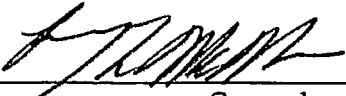
Bernard L. McNamee  
 William G. Bushman  
 McGuireWoods LLP  
 Gateway Plaza  
 800 East Canal Street  
 Richmond, VA 23219-3916  
 (804) 775-7878 (BLM)  
 (804) 804-775-1806 (WGB)  
*bmcnamee@mcguirewoods.com*  
*wbushman@mcguirewoods.com*

7. Dominion Virginia Power respectfully requests that all pleadings and other documents issued in this proceeding by the Commission, the Commission Staff, or a party be served on Dominion Virginia Power and its counsel at the above addresses, and that the Commission's official service list be modified to reflect the same.

WHEREFORE, in accordance with the Commission's Rules of Practice and Procedure and applicable law, Dominion Virginia Power respectfully seeks to participate in this proceeding as a respondent; to file a response on the Motion to Withdraw; or if such Motion is denied, to file comments to the Report responding to the two legal questions raised in the Report; and for all other relief deemed appropriate by the Commission.

Respectfully submitted,

VIRGINIA ELECTRIC AND POWER COMPANY

By:   
Counsel

Lisa S. Booth  
Virginia Electric and Power Company  
120 Tredegar Street  
Richmond, VA 23219-4306  
804.819.2288 (LSB)  
[lisa.s.booth@dom.com](mailto:lisa.s.booth@dom.com)

Bernard L. McNamee  
William G. Bushman  
McGuireWoods LLP  
Gateway Plaza  
800 East Canal Street  
Richmond, VA 23219-3916  
(804) 775-7878 (BLM)  
(804) 804-775-1806 (WGB)  
[bmcnamee@mcguirewoods.com](mailto:bmcnamee@mcguirewoods.com)  
[wbushman@mcguirewoods.com](mailto:wbushman@mcguirewoods.com)

*Counsel for Virginia Electric and Power Company*

September 26, 2016



## STATE CORPORATION COMMISSION

APPLICATION OF	)	
	)	
APPALACHIAN POWER COMPANY	)	
	)	Case No. PUE-2015-00040
For approval of an experimental rider	)	
for the purchase of non-dispatchable	)	
renewable energy	)	

Pursuant to Rules 80 and 110 of the Rules of Practice and Procedure of the State

Corporation Commission (the “Commission”), 5 VAC 5-20-80 and -110, Virginia Electric and Power Company (“Dominion Virginia Power”), by counsel, filed a motion seeking leave to file a notice of participation out of time in the above-styled proceeding and to file a response to Appalachian Power Company’s (“APCo”) *Motion to Withdraw Application and Request to Hold Comment Period in Abeyance* (“Motion to Withdraw”),<sup>1</sup> or if such Motion to Withdraw is denied, to address certain legal and policy issues addressed in the Report of Deborah V. Ellenberg, Chief Hearing Examiner, issued on August 31, 2016 (“Report”) that directly and adversely affect Dominion Virginia Power if it were endorsed by the Commission. This Response of Dominion Virginia Power to the Motion to Withdraw is filed pursuant to Procedural Rule 110, 5 VAC 5-20-110, and Ordering Paragraph (1) of the September 19, 2016 Order in this proceeding that directed responses to APCo’s Motion to Withdraw be filed on or before September 26, 2016.

<sup>1</sup> Pursuant to Procedural Rule 110, 5 VAC 5-20-110, and Ordering Paragraph (1) of the September 19, 2016 Order in this proceeding, responses to APCo's Motion to Withdraw are due on or before September 26, 2016.

Dominion Virginia Power is a public service corporation organized under the laws of the Commonwealth of Virginia furnishing electric service to the public within its Virginia service territory. Dominion Virginia Power also furnishes electric service to the public in portions of North Carolina. Dominion Virginia Power's electric system, consisting of facilities for generation, transmission, and distribution of electric energy, is interconnected with the electric systems of neighboring utilities and is a part of the interconnected network of electric systems serving the continental United States. By reason of its operation in two states and its interconnections with other utilities, Dominion Virginia Power is engaged in interstate commerce. Dominion Virginia Power is also an incumbent electric utility as defined in Va. Code § 56-576 and referenced in Va. Code § 56-577, has a Commission-approved tariff binding on licensed energy suppliers, and offers net-energy metering to its retail customers in accordance with Va. Code § 56-594.

## I. SUMMARY OF POSITION

This proceeding was initiated by APCo on April 17, 2015, through its filing of an application under Va. Code § 56-234 B ("Application") for approval of a voluntary Experimental Rider R.G.P ("Rider RGP").<sup>2</sup> The Application stated that Rider RGP was part of APCo's Renewable Generation Purchase Program, under which a customer could "purchase non-dispatchable renewable energy generated by a facility, located on or adjacent to its property, that is owned and operated by a third party" and further that APCo's RGP Program would help "address its customers' interests in purchasing non-dispatchable renewable energy and provide

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<sup>2</sup> *Application of Appalachian Power Company For approval to establish Experimental Rider R.G.P. for the purchase of non-dispatchable renewable generation*, Case No. PUE-2015-00040 (filed Aug. 31, 2015).

APCo the opportunity to gather valuable information about the impact of intermittent distributed generation on its system.”<sup>3</sup>

Following issuance of the Commission’s Order For Notice and Hearing on May 6, 2015 (“Notice Order”), and a public evidentiary hearing held on September 29, 2015, the Report was issued August 31, 2016, recommending that the Commission deny APCo’s Application. On September 16, 2016, APCo filed the Motion to Withdraw and requested that the Chief Hearing Examiner hold the comment period in abeyance pending a ruling on the Motion to Withdraw. On September 19, 2016, the Commission entered an Order that, among other things, directed responses to the Motion to Withdraw be filed on or before September 26, 2016 and suspended the period for filing comments on the Report pending further order of the Commission.

Dominion Virginia Power takes no position on the only issue identified in the Notice Order and properly before the Commission—whether the Commission should approve the Rider RGP.

However, Dominion Virginia Power, as a public utility subject to the statutory provisions governing the operations of utilities in Virginia, has a substantial interest in the Report’s analysis of Va. Code §§ 56-577 and 56-594, which were not identified in the Notice Order, that may directly and adversely affect Dominion Virginia Power and all electric public utilities in the Commonwealth. Because of the potential or perceived precedential effect of the legal views of these two statutes provided in the Report and the harm they may impose on Dominion Virginia Power’s exercise of its exclusive franchise rights, Dominion Virginia Power requests the Commission, if it chooses to grant the Motion to Withdraw, to state that it is not adopting the Report’s statements regarding Va. Code §§ 56-577 and 56-594 and to make an affirmative statement that the Report has no precedential effect and cannot be relied upon as to the meaning

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<sup>3</sup> Application at 1.

of Va. Code §§ 56-577 and 56-594. Such a statement is needed in order to avoid confusion and prevent a potential illegal and harmful erosion of incumbent utilities' exclusive franchise, which could ultimately hurt customers.

If the Motion to Withdraw is denied, then Dominion Virginia Power would seek to participate in the proceeding and file comments on the Report to address these extraneous legal questions.

## II. THE REPORT

At the evidentiary hearing in this matter, counsel for Appalachian Voices, the Chesapeake Climate Action Network, and the Virginia Chapter of the Sierra Club (collectively, "Environmental Respondents") requested the Commission to consider issues that were neither germane to APCo's Application nor the subject of prior public notice.<sup>4</sup> In particular, Environmental Respondents claimed that Va. Code § 56-594 already allows solar customer generators to enter into third-party purchase power agreements without the need for a rider like Rider RGP.<sup>5</sup> Furthermore, in its post-hearing brief, the Maryland DC Virginia Solar Energy Industries Association ("MDV-SEIA") asserted that "Third-party PPAs are currently lawful in APCo's service territory pursuant to Code Section 56-577(A)(5)(a)[.]"<sup>6</sup> Even though the Report notes that decisions on these two issues are *not* necessary to determine if APCo's Application should be granted or denied (*i.e.*, whether the Application satisfies the requirements of Va. Code § 56-234), the Report nevertheless comments about the meanings of Va. Code §§ 56-577 and 56-594.<sup>7</sup>

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<sup>4</sup> See Tr. 12:12-13:14.

<sup>5</sup> See Tr. 12:12-13:14. APCo's counsel addressed the Environmental Respondents' legal issues by invoking Va. Code §56-577. Tr. 18:6-18.

<sup>6</sup> Post Hearing Brief of MDV-SEIA at 3.

<sup>7</sup> Report at 22-25.

Specifically, the Report asserts that Va. Code § 56-577 permits a third-party renewable generator to sell electricity through a power purchase agreement (“PPA”) to a franchised utility’s retail customer when the utility does not offer a 100% renewable tariff even if such third-party renewable generator does not comply with the utility’s Commission-approved tariff for licensed service providers requiring that such renewable generator serve 100% of the customer’s load.<sup>8</sup> The Report’s conclusion is contrary to the plain reading of Va. Code § 56-577, other parts of the Virginia Code, the Commission’s Retail Access Rules, and Dominion Virginia Power’s Commission-approved tariff.

In addition, the Report asserts that Va. Code § 56-594 A “expressly authorizes customer generators to enter into stand alone, behind-the-meter PPAs with third-party generators that own and operate a renewable generating facility for the customer.”<sup>9</sup> The Report further comments on the meaning of Va. Code § 56-594 as it relates to the meaning of “eligible customer-generator.”<sup>10</sup> The Report’s conclusions about Va. Code § 56-594 are contrary to the plain reading of Va. Code § 56-594, other parts of the Virginia Code, and the Commission’s Net Energy Metering Rules.<sup>11</sup>

### III. THE EXCLUSIVE FRANCHISE AND RETAIL ACCESS

Like APCo and other electric public utilities, Dominion Virginia Power is subject to regulation of its service and facilities under both the Virginia Utility Facilities Act, Chapter 10.1 of Title 56 of the Virginia Code (“Facilities Act”), and the Virginia Electric Utility Regulation Act, Chapter 23 of Title 56 (“Regulation Act”).

<sup>8</sup> Report at 22-24. Note that the Report states the assertions made by various respondents and then states “I agree.” The Report also made a determination as to how Va. Code § 56-577 applies to Dominion Virginia Power. Report at 24.

<sup>9</sup> Report at 24.

<sup>10</sup> Report at 25.

<sup>11</sup> Regulations Governing Net Energy Metering, 20 VAC 5-315-10, *et seq.* (“Net Energy Metering Rules”).

Section 56-265.3 of the Facilities Act requires each public utility, as defined in Va. Code § 56-265.1 (B), to obtain a certificate of public convenience and necessity ("CPCN") before it may furnish public utility service in Virginia and establishes a process for the Commission to issue such CPCNs authorizing each electric public utility to furnish its service within a specific geographic service area. Section 56-265.4 grants each such public utility an exclusive franchise under which no other person or entity that falls within the Facility Act's definition of public utility may furnish electric service within the incumbent utility's certificated service area. This definition, found in Va. Code § 56-265.1 (b), includes "any company which owns or operates facilities within the Commonwealth of Virginia for the generation, transmission, or distribution of electric energy for sale . . .," except for certain exclusions listed in subdivisions (b) (1) through (11) of that section.

A service area CPCN constitutes a vested property right entitled to protection by the courts,<sup>12</sup> and this Commission has held that any sale of electric power makes the seller a public utility, as defined in the Facilities Act.<sup>13</sup> This Commission has been a strong supporter of these exclusive franchises and has enjoined sales and distribution of electric power to retail customers in the certificated service area of an incumbent electric utility as violations of the incumbent utility's exclusive franchise granted under the Facilities Act.<sup>14</sup>

<sup>12</sup> *Town of Culpeper v. Va. Elec. and Power Co.*, 215 Va. 189 193-94, 207 S.E.2d 864, 867-68 (1974) ("Culpeper"); *N. Va. Elec. Coop. v Va. Elec. and Power Co.*, 265 Va. 363, 368-69, 576 S.E.2d 741, 744 (2003) ("NOVEC").

<sup>13</sup> *Application of Patowmack Power Partners, L.P., For approval of expenditures for generation facilities pursuant to Va. Code § 56-234.3 and for a certificate of public convenience and necessity pursuant to Va. Code § 56-265.2*, Case No. PUE-1991-00081, Order Denying Application (Oct. 17, 1995), 1995 S.C.C. Ann. Rept. 268, 269.

<sup>14</sup> *See Petition of Kentucky Utilities Company d/b/a Old Dominion Power Company For injunctive relief and/or for declaratory judgment against Powell Valley Electric Cooperative*, Case No. PUE-1996-00303, Final Order (Mar. 31, 1999), 1999 S.C.C. Ann. Rept. 368, 376 (enjoining the sale or distribution of electric power); *Petition of Prince George Electric Cooperative For declaratory judgment and Petition of RGC (USA) Mineral Sands, Inc. and RGC (USA) Minerals, Inc., For declaratory judgment*, Case No. PUE-1996-00295, Order On Petitions For Declaratory Judgment (June 25, 1998), 1998 S.C.C. Ann. Rept. 344, 349 (enjoining the sale or distribution of electric power). *See also NOVEC, supra.*

The exclusive franchise of electric public utilities to sell electric service to retail customers in their certificated service areas has been modified by Va. Code § 56-577 of the Regulation Act. That section now grants to three categories of individual retail customers the right of retail access to purchase electric energy from any licensed supplier other than the customer's incumbent electric utility: (1) under subdivision A 3, a large customer whose peak load generally exceeded 5 MW in the most recent calendar year; (2) under subdivision A 4, two or more individual nonresidential customers whose individual peak loads in the most recent calendar year did not exceed 5 MW but who have petitioned for and received from the Commission permission to aggregate or combine their demands for the purpose of meeting the demand limitations of subdivision A 3; and (3) under subdivision A 5, individual retail customers, regardless of customer class, who purchase electric energy provided 100% from renewable energy. In each case, however, retail access is only permitted for purchases of electric energy from retail suppliers who have been licensed by the Commission under Va. Code § 56-587. Retail access is not granted for purchases from suppliers that have not been so licensed by the Commission.

To implement and enforce its jurisdiction and duty to license and regulate these competitive service providers ("CSPs"), as well as to assure the nondiscriminatory access of retail customers and their licensed CSPs to the transmission and distribution systems, the Commission promulgated its Retail Access Rules in 20 VAC 5-312.<sup>15</sup> These rules, which also apply to retail access for retail customers of natural gas public utilities, include the requirement in 20 VAC 5-312-40 and -50 that the local distribution company and CSP must adhere to standardized practices for exchanging data and information as filed with the Commission or

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<sup>15</sup> *Commonwealth of Virginia ex rel. State Corporation Commission Ex. Parte: In the matter of establishing rules for retail access*, Case No. PUE-2001-00013, Final Order (June 19, 2001), 2001 S.C.C. Ann. Rept. 536.

otherwise provided by the local distribution company's retail access tariff provisions approved by the Commission, including provisions to facilitate the local distribution's company's receipt from the CSP, and delivery by the local distribution company to the retail customer, of the power purchased by the retail customer from the CSP. Dominion Virginia Power's Competitive Service Provider Coordination Tariff ("CSP Tariff"), which has been in effect since 2003,<sup>16</sup> was most recently reviewed and approved by the Commission in 2010.<sup>17</sup>

#### **IV. THE REPORT'S ANALYSIS OF VA. CODE §§ 56-577 A AND 56-594 IN THIS PROCEEDING SHOULD BE REJECTED OR NOT ADOPTED**

##### **A. The Issues Are Extraneous And Do Not Need To Be Decided In This Proceeding**

As stated in the Notice Order, APCo's Application in this proceeding only sought Commission approval of the proposed Rider RGP, a request governed by the provisions of Va. Code § 56-234 B, which permits the Commission to approve voluntary rate or rate design tests or experiments, or other experiments involving the use of special rates, where such experiments have been approved by order of the Commission "after notice and hearing and a finding that such experiments are necessary in order to acquire information which is or may be in furtherance of the public interest."<sup>18</sup>

After considering the standard of review for Va. Code § 56-234 B and analyzing the evidence and arguments of the parties and Staff,<sup>19</sup> the Report recommends that the Commission deny APCo's application for approval of the proposed Rider RGP. This recommendation was based on the Report's findings "that the Rider would not encourage renewable development," "evidence that it would discourage development contrary to the Commonwealth Energy Policy,"

<sup>16</sup> *Application of Virginia Electric and Power Company d/b/a Dominion Virginia Power For approval of retail access pilot programs*, Case No. PUE-2003-00118, Final Order (Sept. 10, 2003), 2003 S.C.C. Ann. Rept. 478.

<sup>17</sup> *Application of Virginia Electric and Power Company For revised Competitive Service Provider Tariff*, Case No. PUE-2010-00043, Final Order (Aug. 23, 2010), 2010 S.C.C. Ann. Rept. 452.

<sup>18</sup> Va. Code § 56-234 B.

<sup>19</sup> Report at 15.



and Rider RGP's pricing structure, which included a variable Renewable Output Credit that the Report finds would create pricing uncertainty.<sup>20</sup> In the event the Commission were to decide to approve Rider RGP, the Report recommends the Commission include certain revisions proposed by the Staff.<sup>21</sup>

After disposing of Rider RGP, however, the Report departs from the subject matter of the Application and Notice Order to address the positions of Environmental Respondents and MDV-SELA on two extraneous issues related to the legality of PPAs with retail customers under Va. Code §§ 56-577 and 56-594. Though the Report agrees with the Staff and APCo that these legal arguments need not be addressed in this proceeding for the Commission to determine whether APCo's Rider RGP should be approved; the Report, nevertheless, provides its analysis of those extraneous issues:

*Although I agree with Staff and the Company that the Commission need not address these legal issues to determine if the Company's proposal meets the statutory standard of § 56-234, APCo has taken the position that customers cannot legally execute PPAs directly with third party generators except under its proposed Program which raises uncertainty that could adversely impact development of renewable energy. The renewable generation market needs clarity in order to promote development, and the Commission may elect to address the issues now in this case, particularly because APCo now has a petition pending for approval to provide a tariff offering 100% renewable energy, or in another case. So I will address the question here.<sup>22</sup>*

#### **B. The Report's Interpretation of Va. Code § 56-577 A 5 Should be Rejected**

The Report asserts that Va. Code § 56-577 A 5 permits a third-party renewable generator to sell electricity through a PPA to a franchised utility's retail customer when the utility does not offer a 100% renewable tariff, even if such third-party renewable generator does not comply with

<sup>20</sup> Report at 20.

<sup>21</sup> Report at 25.

<sup>22</sup> Report at 22-23 (emphasis added and internal footnote omitted). The other pending case referenced in the Report is *Petition of Appalachian Power Company For approval of a 100% renewable energy rider*, Case No. PUE-2016-00051 (filed Apr. 28, 2016), referenced further below.

the utility's Commission-approved tariff for licensed service providers requiring that such renewable generator serve 100% of the customer's load.<sup>23</sup> These conclusions about Va. Code § 56-577 are contrary to the plain reading of Va. Code § 56-577, other parts of the Virginia Code, the Commission's Retail Access Rules, and Dominion Virginia Power's Commission-approved tariff.<sup>24</sup>

1. Requirements for Licensed Energy Suppliers under Va. Code §§ 56-577 and 56-587, and the Commission's Retail Access Rules Should Not Be Ignored

A portion of the Report contains the heading “Legality of PPAs between Retail Customers and Third-Party Providers in Virginia.”<sup>25</sup> In this section, the Report provides its interpretation of Va. Code § 56-577 A 5, which the Report quotes as follows:

After the expiration or termination of capped rates, individual retail customers of electric energy within the Commonwealth, regardless of customer class, shall be permitted:

a. *To purchase electric energy provided 100 percent from renewable energy from any supplier of electric energy licensed to sell retail electric energy within the Commonwealth*, other than any incumbent electric utility that is not the

<sup>23</sup> Report at 22-24. Note that the Report states the assertions made by various respondents and then states “I agree.” The Report also makes an assertion as to how Va. Code § 56-577 applies to Dominion Virginia Power.

The provisions of Code § 56-577 A 5 are not limited to Dominion Virginia Power, and clearly allow customers under any customer class “[t]o purchase electric energy provided 100 percent from renewable energy from any supplier of electric energy licensed to sell retail electric energy within the Commonwealth . . . if the incumbent electric utility serving the exclusive service territory does not offer an approved tariff for electric energy provided 100 percent from renewable energy . . . .”

Report at 24 (internal citation omitted).

<sup>24</sup> Dominion Virginia Power's Pilot Program, pursuant to Chapter 358 of the 2013 Acts of the Assembly (HB 2334 (2013)), supports Dominion Virginia Power's argument. Identical legislation was also enacted as Chapter 362 of the 2013 Acts of Assembly (SB 1023). It is also noteworthy that the General Assembly enacted HB 2334 in 2013. This uncodified Act provides for a limited pilot program only in Dominion Virginia Power's service territory under which "a person that owns or operates a solar-powered or wind-powered electricity generation facility with a capacity between 50 kilowatts and one megawatt that is located on premises owned or leased by an eligible customer-generator will be allowed to sell the electricity generated from such facility exclusively to the eligible customer-generator under a power purchase agreement." If Va. Code § 56-577 meant what the Environmental Respondents, MDV-SEIA, and Consumer Counsel, and as agreed with by the Report, there would have been no reason for the HB 2334 solar/wind PPA pilot programs; yet, the General Assembly authorized it as a pilot program in Dominion Virginia Power's service territory only to allow certain customers to enter into PPAs with non-CSPs.

<sup>25</sup> Report at 22.

incumbent electric utility serving the exclusive service territory in which such a customer is located, *if the incumbent electric utility serving the exclusive service territory does not offer an approved tariff for electric energy provided 100 percent from renewable energy*; and

b. To continue purchasing renewable energy pursuant to the terms of a power purchase agreement in effect on the date there is filed with the Commission a tariff for the incumbent electric utility that serves the exclusive service territory in which the customer is located to offer electric energy provided 100 percent from renewable energy, for the duration of such agreement.<sup>26</sup>

The Report agrees with Environmental Respondents, MDV-SEIA, and the Office of the Attorney General, Division of Consumer Counsel (“Consumer Counsel”) that Va. Code § 56-577 A 5 means that if an incumbent utility does not provide a tariff for 100% renewable energy, a Commission-licensed third party renewable generator may sell renewable energy to serve a *portion* of the customer’s load so long as the energy the renewable generator is providing is 100% renewable energy.<sup>27</sup>

But 100% renewable energy service from a third party can only be provided by a “supplier of electric energy licensed to sell retail electric energy within the Commonwealth[.]”<sup>28</sup> Such a license to supply retail electric energy is governed by Va. Code § 56-587, which requires that anyone (other than the incumbent service provider) “seeking to sell, offering to sell, or selling electric energy to any retail customer in the Commonwealth, on and after January 1, 2002, shall obtain a license from the Commission to do so.”<sup>29</sup> In fact, the Commission promulgated Retail Access Rules in 2001, and these rules are still in effect today.<sup>30</sup>

Va. Code § 56-587 is applicable to all licensed suppliers, including renewable energy suppliers under Va. Code § 56-577 A 5. Among other things, the Retail Access Rules, 20 VAC

<sup>26</sup> Report at 23 (emphasis in original).

<sup>27</sup> Report at 22-24.

<sup>28</sup> Va. Code § 56-577 A 5 (a).

<sup>29</sup> Va. Code § 56-587 A.

<sup>30</sup> *Commonwealth of Virginia ex rel. State Corporation Commission Ex. Parte: In the matter of establishing rules for retail access*, Case No. PUE-2001-00013, Final Order (June 19, 2001), 2001 S.C.C. Ann. Rept. 536.

5-312-20 E, state that a retail customer's electricity supply service must be obtained from either its local distribution company or its CSP. Furthermore, both APCo and Dominion Virginia Power have Commission-approved tariffs implementing the Code that require that a CSP must meet 100% of a customer's load.

APCo sought to make this point by explaining that purchases of power by retail customers from licensed third-party suppliers are only permitted if consistent with APCo's Commission-approved retail access tariff.<sup>31</sup> In this case, APCo cited its Open Access Distribution Service Schedule, which states "[a] third customer is not permitted to have partial competitive electric service. The [third party provider] shall be responsible for providing the total energy consumed in any given billing month."

<sup>31</sup> Except in Dominion Virginia Power's Pilot Program, pursuant to HB 2334 (2013). See *supra* footnote 23.

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Nowhere in the analysis does the Report discuss the requirement of APCo's tariff that the licensed provider must supply 100% of the retail customer's load, as discussed below.

2. The utilities' retail access tariffs cannot be ignored

APCo explained that, in addition to the undisputed requirements of Va. Code § 56-577 A 5 that the retail customer must purchase the power from a licensed CSP and that the power purchased must be provided 100% from renewable energy, the purchase must also comply with APCo's Commission-approved Terms and Conditions of Open Access Distribution Service,<sup>36</sup> which is governed by the Commission's Retail Access Rules, promulgated consistent with Va. Code § 56-587. These Terms and Conditions state on Sheet 3-3D that they apply to those customers eligible to take energy services from a qualified Energy Service Provider ("ESP" in the APCo tariff). They state further on Sheet 3-4D that an eligible customer who desires service must first contract with an ESP who must notify APCo and arrange with APCo to distribute to the customer the power to be purchased by the customer from the ESP and further that:

A customer is not permitted to have partial competitive electric service. The ESP(s) shall be responsible for providing the total energy consumed by the customer during any billing month.

These APCo tariff provisions governing retail access for its retail customers are not unique to APCo. Indeed, Section XXIV, Retail Access, of the Terms and Conditions for Provision of Service in Dominion Virginia Power's Commission-approved Virginia retail tariff, provides as follows:

A. Retail access provides the Company's retail Customers who meet the eligibility criteria as provided in Va. Code § 56-577 A with the opportunity to receive Electricity Supply Service from a Competitive Service Provider (CSP). If a Customer, who meets the eligibility criteria as referenced above, chooses to receive Electricity Supply Service from a CSP, the Company will continue to provide such Customer with Electric Delivery Service in accordance with an applicable Rate Schedule. . . .

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<sup>36</sup> Report at 23.

C. . . . The Company may discontinue or deny services to any Provider if the Provider fails to comply with the Company's CSP Coordination Tariff and related rules or if the Company is directed to do so by the Commission or any other governmental authority. . . .<sup>37</sup>

Similarly, Section 10.4 of Dominion Virginia Power’s Commission-approved Competitive Tariff contains the following language, consistent with the 100% of load requirement present in the APCo tariff:



tariff provisions requiring an ESP to provide 100% of customer load as if they are no longer operative:

The Environmental Respondents, MDV-SEIA, and Consumer Counsel all assert that the provisions of Code § 56-577 are not so limiting, and provide that the consumer can purchase 100% renewable energy from third-party providers. They further assert that the Code does not require customers to take 100% of their load from such providers, but rather only requires that all energy purchased must be 100% renewable energy. I agree.<sup>39</sup>

The question whether to make such a major revision to a longstanding existing tariff involves issues of both law and policy, and such a decision should only be reached in a proper proceeding, with clear public notice and the development of a robust evidentiary record. Moreover, potentially affected participants in the Virginia renewable energy market, such as Dominion Virginia Power and other public utilities, should be fully heard on both the legal and policy issues supporting existing 100% of customer load tariff provisions as well as those supporting any proposed alternatives. As noted above, Dominion Virginia Power's CSP Tariff contains a provision requiring CSPs to provide 100% of customer load. This is not a proper proceeding for such a determination, as APCo argued on brief, and it should not be decided here.

4. The Report's interpretation of Va. Code § 56-577 undermines the exclusive franchise of electric public utilities to deliver power to their retail customers

The Report also ignores the fact that the retail access that is permitted by Va. Code § 56-577 A in no way eliminates an electric public utility's exclusive franchise to deliver, or distribute, to its retail customer the electric energy that the customer has purchased from a CSP. This exclusive distribution franchise, which prohibits anyone else from delivering power directly to an electric public utility's customers, is explicitly preserved in Va. Code § 56-580:

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<sup>39</sup> Report at 24.

- A. Subject to the provisions of § 56-585.1, the Commission shall continue to regulate pursuant to this title the distribution of retail electric energy to retail customers in the Commonwealth and, to the extent not prohibited by federal law, the transmission of electric energy in the Commonwealth.

...

- E. Nothing in this section shall impair the distribution service territorial rights of incumbent electric utilities, and incumbent electric utilities shall continue to provide distribution services within their exclusive service territories as established by the Commission. Nothing in this chapter shall impair the Commission's existing authority over the provision of electric distribution services to retail customers in the Commonwealth including, but not limited to, the authority contained in Chapters 10 (§ 56-232 et seq.) and 10.1 (§ 56-265.2 et seq.) of this Title.

This fact is reflected in the Commission's Equal Access Rules and the implementing tariffs of both APCo and Dominion Virginia Power reflected above.<sup>40</sup> Also as noted above, whether the power purchased from a CSP under retail access is renewable or otherwise, the power must be delivered by the CSP to the customer's retail electric public utility for delivery by the utility to its retail customer under the utility's applicable rate schedule for electric distribution service. The retail customer and licensed service provider may not bypass the utility's distribution franchise by agreeing to construct the generator to the customer's electric system behind the utility's delivery meter.

Dominion Virginia Power's exclusive service franchise would be eroded if the Commission does not reject the Report's conclusion that Va. Code § 56-577 A 5 permits a third-party renewable generator to sell electricity through a PPA to a franchised utility's retail customer when the utility does not offer a 100% renewable tariff even if such third-party

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<sup>40</sup> See also Dominion Virginia Power's CSP Tariff. Section 3.1 establishes the CSP Tariff's purpose of providing "the basic requirements for interactions and coordination between the Company, as the *local distribution company*, and each CSP necessary for ensuring the *delivery* of Electricity Supply Service to Retail Customers via the Company's transmission and distribution system." (Emphasis added.) Section 3.6 states that "[t]he Company shall provide the CSP with Coordination Services as necessary for the *delivery* of Electricity Supply Service to its Retail Customers located within the Company's service territory." (Emphasis added.)





renewable generator does not comply with the utility's Commission-approved tariff for licensed service providers requiring that such renewable generator serve 100% of the customer's load.<sup>41</sup>

Because the Report's discussion of Va. Code § 56-577 A 5 could cause confusion among generators and customers and erode utilities' exclusive franchise, an order granting the Motion to Withdraw should specifically reject the Report's analysis of Va. Code § 56-577 A 5 and include a statement that the Report has no precedential value.

### **C. The Report's Interpretation of Va. Code § 56-594 Should Be Rejected**

The Report asserts that Va. Code § 56-594 A "expressly authorizes customer generators to enter into stand alone, behind-the-meter PPAs with third-party generators that own and operate a renewable generating facility for the customer."<sup>42</sup> The Report further comments on the meaning of Va. Code § 56-594 as it relates to the meaning of "eligible customer-generator."<sup>43</sup> The Report's assertions about Va. Code § 56-594 are contrary to the plain reading of Va. Code § 56-594 and other parts of the Virginia Code. In short, Va. Code § 56-594 merely permits customers to sell excess energy produced from the customer's on-site generation back to its energy supplier (which could be a utility or a CSP) on the grid, which is a wholesale sale of power. Va. Code § 56-594 does not grant third-party renewable generators any rights to sell power to a Virginia utility's retail customers.

1. Net-metering customers can sell back to the grid excess power generated on-site, but net metering provides no right for third-party generators to sell power to customers

Environmental Respondents argued in their opening statement and in their post-hearing brief that APCo's Rider RGP is unnecessary because customers in its service territory can

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<sup>41</sup> Report at 22-24.

<sup>42</sup> Report at 24.

<sup>43</sup> Report at 25.

already enter into PPAs pursuant to Va. Code § 56-594, the net metering statute.<sup>44</sup> Similarly, Consumer Counsel asserted that under Va. Code § 56-594 retail customers could contract with third parties for renewable energy.<sup>45</sup> The Report agrees, stating that “net metering does provide an option for customers, and contrary to APCo’s contention, Code § 56-594 B does allow customers to contract with third parties to ‘own, operate, or both, an electrical generating facility’ that complies with the other requirements of the Code.”<sup>46</sup>

Though citing the language of the statute, the Report misconstrues Va. Code § 56-594 B’s definition of “eligible customer-generators,” which states:

*“Eligible customer-generator” means a customer that owns and operates, or contracts with other persons to own, operate, or both, an electrical generating facility that (i) has a capacity of not more than 20 kilowatts for residential customers and not more than one megawatt for nonresidential customers on an electrical generating facility placed in service after July 1, 2015; (ii) uses as its total source of fuel renewable energy, as defined in § 56-576; (iii) is located on the customer’s premises and is connected to the customer’s wiring on the customer’s side of its interconnection with the distributor; (iv) is interconnected and operated in parallel with an electric company’s transmission and distribution facilities; and (v) is intended primarily to offset all or part of the customer’s own electricity requirements. In addition to the electrical generating facility size limitations in clause (i), the capacity of any generating facility installed under this section after July 1, 2015, shall not exceed the expected annual energy consumption based on the previous 12 months of billing history or an annualized calculation of billing history if 12 months of billing history is not available.”<sup>47</sup>*

All this definition says is that a customer-generator eligible for net metering is one who “owns and operates” an electrical generating facility or who “contracts with other persons to own, operate, or both” an electrical generating facility. Nowhere does this definition establish the right for a third-party generator to sell power to a retail customer.<sup>48</sup> To the contrary, Va. Code

<sup>44</sup> Report at 24; *see also* Environmental Respondents Post-Hearing Brief, at 2-3 (Nov. 3, 2015); Tr. 22:4-23:5.

<sup>45</sup> Report at 24.

<sup>46</sup> Report at 25 (footnote omitted).

<sup>47</sup> Va. Code § 56-594 B (emphasis added).

<sup>48</sup> Va. Code § 56-594 does mention PPAs, but only in the context of the net metering customer signing a contract or PPA with the incumbent utility or its CSP supplier to take the excess electricity produced by the customer’s behind the meter generation facility. *See* Va. Code § 56-594 E.

§ 56-594 only provides “eligible customer-generators” with the opportunity to sell back to the grid, through excess power from their behind-the meter generation facilities that they “own or operate” or that they contract with other persons to “own or operate.”

2. Net-metering contracts/PPAs only apply to the wholesale of excess electricity from the customer-generator to the supplier

Subsection B defines the term “net energy metering” to mean “measuring the difference . . . between (i) electricity supplied to an eligible customer-generator . . . from the electric grid and (ii) the electricity generated and fed back to the electric grid by the eligible customer-generator.”<sup>49</sup> The only power purchase agreements permitted under net energy metering are described in Va. Code § 56-594 D and E:

- D. The Commission shall establish minimum requirements for contracts to be entered into by the parties to net metering arrangements. Such requirements shall protect the eligible customer-generator or eligible agricultural customer-generator against discrimination by virtue of its status as an eligible customer-generator or eligible agricultural customer-generator, and permit customers that are served on time-of-use tariffs that have electricity supply demand charges contained within the electricity supply portion of the time-of-use tariffs to participate as an eligible customer-generator or eligible agricultural customer-generator. Notwithstanding the cost allocation provisions of subsection C, eligible customer-generators or eligible agricultural customer-generators served on demand charge-based time-of-use tariffs shall bear the incremental metering costs required to net meter such customers.
- E. If electricity generated by an eligible customer-generator or eligible agricultural customer-generator over the net metering period exceeds the electricity consumed by the eligible customer-generator or eligible agricultural customer-generator, the customer-generator or eligible agricultural customer-generator shall be compensated for the excess electricity if the entity contracting to receive such electric energy and the eligible customer-generator or eligible agricultural customer-generator enter into a power purchase agreement for such excess electricity. Upon the written request of the eligible customer-generator or eligible agricultural customer-generator, the supplier that serves the eligible customer-generator or eligible agricultural customer-generator shall enter into a power purchase agreement with the requesting eligible customer-generator or eligible agricultural customer-generator that is consistent with the minimum requirements for contracts established by the Commission pursuant to subsection

<sup>49</sup> Va. Code § 56-594 B.

D. The power purchase agreement shall obligate the supplier to purchase such excess electricity at the rate that is provided for such purchases in a net metering standard contract or tariff approved by the Commission, unless the parties agree to a higher rate. . . <sup>50</sup>

The Commission has implemented Va. Code § 56-594 for eligible customer generators by adopting its revised Net Energy Metering Rules,<sup>51</sup> which specify the process for establishing a wholesale power purchase agreement between the eligible customer-generator and its grid supplier; permitted supplier charges, the conditions of interconnection with its electric utility distribution company; and metering, billing, payment and other contract or tariff considerations.<sup>52</sup>

In short, Va. Code § 56-594 and the Net Energy Metering Rules merely facilitate *wholesale* sales of excess power from eligible customer-generators back to the grid. They neither grant any right of *retail* access to a retail customer nor do they permit a third party developer to sell or deliver power from any source directly to a *retail* customer in Dominion Virginia Power's service territory. Yet, the Report erroneously interprets Va. Code § 56-594 to allow third parties to sell power to the utility's retail customers.

The Report's analysis, if not specifically rejected in an order granting the Motion to Withdraw with a statement that the Report has no precedential value, could have even broader

<sup>50</sup> Va. Code § 56-594 D & E.

<sup>51</sup> 20 VAC 5-315-10, et seq.

<sup>52</sup> *Commonwealth of Virginia, ex rel. State Corporation Commission Ex Parte: In the matter of amending regulations governing net energy metering*, Case No. PUE-2015-00057, Correcting Order Adopting Regulations (Dec. 4, 2015), 2015 S.C.C. Ann. Rept. 347. Net Energy Metering Rule 20 VAC 5-315-20 creates definitions for certain terms not found in Va. Code § 56-594. The definition of "net metering customer" states that the electrical generating facility for an eligible customer-generator may consist of one or more "renewable fuel generators" so long as the aggregate capacity does not exceed the statutory limit of 20 kW for residential customers and one megawatt level for nonresidential customers, while the definition of "agricultural net metering customer" states that the electrical generating facility for an eligible agricultural customer-generator may consist of one or more "agricultural renewable generators" so long as the aggregate capacity does not exceed the statutory limit of 500 kW. See also *Application of Virginia Electric and Power Company for approval of a standby charge and methodology and revisions to its tariff and terms and conditions of service pursuant to § 56-594 F of the Code of Virginia*, Case No. PUE-2011-00088, 2011 S.C.C. Ann. Rept. 530, Final Order (Nov. 23, 2011), 2012 S.C.C. Ann. Rept. 292, Order on Reconsideration (Jan. 17, 2012).

impact than the revision of an individual utility's tariff contemplated by the Report's analysis of Va. Code § 56-577 A. Allowing such a reinterpretation of Va. Code § 56-594 to stand, and the resulting upheaval of the Commission's Net Metering Rules, demonstrates that this is not the appropriate proceeding for the Commission to make such far reaching determinations about an issue that was not noticed to the public and other interested parties, such as Dominion Virginia Power. Because the Report's discussion of Va. Code § 56-594 could cause confusion among generators and customers and erode utilities' exclusive franchise rights, an order granting the Motion to Withdraw should specifically reject the Report's analysis of Va. Code § 56-594 and include a statement that the Report has no precedential value.

**D. The Report Does Not Recommend That The Commission Approve, Adopt Or Otherwise Take Action In This Proceeding On The Report's Analyses Of Va. Code §§ 56-577 A or 56-594**

As previously noted, Va. Code §§ 56-577 and 56-594 were not part of the Notice in the proceeding. In addition, Staff, APCo, and the Report itself all agree that the issues do not need to be resolved in order to make a decision about APCo's Application in this proceeding. Indeed, the Report does not describe its views on these statutes as legal findings, and the results of the Report's analysis of them are omitted from the list of specific "Findings and Recommendation" on pages 25-26 of the Report that it recommends be adopted by the Commission. This provides a further confirmation that these issues are extraneous to this proceeding, should not be adopted by the Commission, and should be specifically rejected in an order granting the Motion to Withdraw.

Unfortunately, the Commission cannot merely ignore the Report's comments interpreting Va. Code §§ 56-577 and 56-594. Far from addressing "uncertainty" and providing "clarity" as the Report suggests as its justification for addressing these issues, greater confusion as to the











By:

  
Counsel

September 26, 2016

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### CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of September 2016, a true and accurate copy of the enclosed was mailed first class, postage pre-paid, to the following:

Noelle J. Coates  
American Electric Power Service Corp.  
3 James Center  
1051 E. Cary St., Suite 1100  
Richmond, Virginia 23219

James R. Bacha, Esq.  
Hector Garcia, Esq.  
American Electric Power Service Corp.  
1 Riverside Plaza  
Columbus, OH 43215

William C. Cleveland, Esq.  
Frank Rambo, Esq.  
Southern Environmental Law Center  
201 W. Main Street, Suite 14  
Charlottesville, VA 22902-5065


Robert D. Perrow, Esq.  
John L. Walker, III, Esq.  
Williams Mullen  
P.O. Box 1320  
Richmond, VA 23218-1320

C. Meade Browder, Jr., Esq.  
Division of Consumer Counsel  
Office of the Attorney General  
202 North Ninth Street  
Richmond, VA 23219

Robert B. Lambeth, Jr., President  
Council of Independent Colleges in  
Virginia  
P.O. Box 1005  
Bedford, VA 24523

Carol C. Wampler, Project Manager  
Council of Independent Colleges in  
Virginia  
P.O. Box 3  
Oilville, VA 23129

Brian R. Greene, Esq.  
Eric W. Hurlocker, Esq.  
Eric J. Wallace, Esq.  
William T. Reisinger, Esq.  
GreeneHurlocker, PLC  
1807 Libbie Avenue, Suite 102  
Richmond, VA 23226

  
Counsel